Supreme Court, U.S.
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No. 99-1048

IN THE
Supreme Court of the United States

KANSAS STATE UNIVERSITY,

Petitioner,

v.

MARK AND GENEVIEVE INNES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

At a minimum, respondents' brief in opposition (Resp.) demonstrates that there is confusion, uncertainty and conflict in the Courts of Appeal regarding the circumstances in which a State may waive its Eleventh Amendment immunity, perhaps particularly in the bankruptcy context. Furthermore, respondent's efforts to distinguish the Tenth Circuit's holdings in this case from recent, clear decisions of this Court interpreting the Eleventh Amendment are unavailing. Thus, Kansas State University respectfully requests that this Court either summarily reverse the erroneous decision of the Tenth Circuit in this case or, in the alternative, grant *certiorari* and set this case for plenary review.

I. The Tenth Circuit Rendered A Decision In Conflict With The Decisions Of This Court And Of Other United States Courts Of Appeal When It Held That A State Official Need Not Have Explicit Authority To Waive A State's Eleventh Amendment Immunity In Order To Effect Such A Waiver.

The Tenth Circuit's decision in this case conflicts with relevant decisions of this Court *and* the decisions of several other United States Courts of Appeal on the same important issue whether a state official needs to have the express authority to waive a state's right which is recognized in the Constitution. Even respondents' discussion of this issue demonstrates differences of opinion and confusion in the Courts of Appeal, warranting this Court's review of the Tenth Circuit's decision.

Respondent's characterization of *Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945), ignores the case's holding and the multitude of Circuit decisions that reject respondents' reading of *Ford Motor Co.* The Court in *Ford Motor Co.* held that a state official's authority to waive the State's Eleventh Amendment immunity is determined by that State's Constitution, statutes and decisions. Respondent incorrectly concludes that because

Indiana's Constitution required general waivers of immunity and Kansas's Constitution is silent, there is an *implicit* grant of authority for waiver in Kansas unless *expressly withheld* by statute. Resp. at 1-2. That conclusion goes beyond anything the Court said or held in *Ford Motor Co.*, ignores numerous contrary Court of Appeals decisions, and flies in the face of this Court's more recent Eleventh Amendment decisions.

Ford Motor Co. held that the authority to waive the Eleventh Amendment is an issue of state law determined by the state's Constitution, statutes and decisions. *Id.* at 467. The question becomes: when all such sources of state law are silent, is authority to waive granted or denied? The answer is clear and comes from the inherent nature of the State's immunity, recognized but not created by the Eleventh Amendment. Under this Court's Eleventh Amendment decisions, all a state needs to do to preserve its constitutional immunity is assert it. The immunity can only be waived where the state affirmatively invokes the jurisdiction of a federal court or *expressly* waives the immunity. Neither condition is present here. Thus, the Tenth Circuit's decision is contrary to this Court's relevant decisions and should be summarily reversed or *certiorari* granted to resolve the issue.

At a minimum, respondents demonstrate that there is conflict between the Tenth Circuit and other Circuits on this important issue.[1] Regardless of one's interpretation of these

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[1] Respondents cite several Court of Appeals decisions that Respondent asserts conflict with those cited by Kansas State University in its petition. *See e.g. In re Rose*, 187 F.3d 926 (8th Cir. 1999) (finding waiver through invocation of federal jurisdiction, relying on *In re Collins*, 173 F.3d 924 (4th Cir. 1999), *cert. denied sub nom. Virginia v. Collins*, 120 S. Ct. 785 (2000)), *disagreed with by In re Seay*, 244 B.R. 112, 117-18 (Bankr. E.D. Tenn. 2000); *Hankins v. Finnel*, 964 F.2d 853, 859 (8th Cir. 1992) (finding waiver for prospective and injunction relief already allowed under *Ex Parte Young* doctrine); *Vargas v. Trainor*, 508 F.2d 485, 492 (7th Cir. 1974) (holding that "[a] representation made in a judicial proceeding for

various cases, respondents' assertions and citations emphasize the fact that there is conflict among the Circuits on this important issue.

Finally, waiver of the Eleventh Amendment is not the same as waiver of general sovereign immunity or of contractual rights. *See e.g. Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560 (8th Cir. 1995) (rejection of Indian tribe's attempt to raise sovereign immunity against the other party with whom it had contracted); *Peter Kiewit & Sons' Co. v. State Highway Comm'n*, 184 Kan. 737, 741-42, 339 P.2d 267, 271 (1959). Thus, respondents incorrectly rely upon cases involving affirmative invocation of federal jurisdiction and tort sovereign immunity. Respondents appear to argue that waiver of sovereign immunity in one context (e.g., tort claims against the State) constitutes a valid *inference for waiver* of all immunities in all courts. See Resp. at 1-2. *Ford Motor Co.* long ago rejected that proposition. Indeed, this Court has been quite clear that a state's general waiver of sovereign immunity from tort suits in state court does not waive the State's Eleventh Amendment immunity from suits in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

KSU respectfully requests that this Court summarily reverse the Tenth Circuit's erroneous decision or, in the alternative, grant *certiorari* to resolve this issue.

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the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in *Edelman*."); *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1999) (Indian tribe attempted to assert sovereign immunity—not Eleventh Amendment immunity—against other party to construction contract).

II. The Tenth Circuit's Decision That Congress Can Delegate Its Spending Powers To Administrative Agencies In The Executive Branch To Effect A Conditional Waiver Of A State's Eleventh Amendment Immunity Conflicts With Relevant Decisions Of This Court.

Ignoring the language of the Tenth Circuit's decision, respondents argue that KSU expressly waived its Eleventh Amendment immunity by affirmatively invoking federal jurisdiction. The Tenth Circuit, however, did not find *express* waiver or *voluntary invocation* of federal jurisdiction. Rather, the Tenth Circuit relied upon language in the regulations and contract of a federal agency to conclude that KSU's Eleventh Amendment immunity was "deemed" waived. *Cf. Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 654 (2000) (Thomas, J., concurring in part, dissenting in part) (emphasizing the *Atascadero* clear statement requirement and questioning whether even *statutes* incorporating abrogation provisions of other *statutes* by reference can satisfy that requirement); *Port Authority Trans-Hudson Corp v. Feeney*, 495 U.S. 299, 305-06 (1990) (finding unequivocal express waiver in statute alone, and not agency regulations).

KSU has not affirmatively and voluntarily invoked the jurisdiction of the federal courts. *Cf. Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *Gardner v. State of New Jersey*, 329 U.S. 565 (1947). A *contract* alone surely cannot be such an invocation. Moreover, mere authority to contract is different from authority to waive a State's constitutional immunity. This Court has made clear that the standard for waiving that immunity is very high and will be found in only the clearest and most unequivocal instances. *Port Authority Trans-Hudson Corp v. Feeney*, 495 U.S. 299, 305-06 (1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-41 (1985). The legal treatment of agreements for aviation services, *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975)

(tort immunity of State found invalid after tragic death of student athletes in plane crash), or construction, *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560 (8th Cir. 1995) (rejection of Indian tribe's attempt to raise sovereign immunity against the other party with whom it had contracted), does not illuminate the Eleventh Amendment issues raised in this case, which arise under a contract between the USDOE and KSU, and to which respondents are not even parties.

KSU respectfully requests that this Court summarily reverse the Tenth Circuit's erroneous decision or, in the alternative, grant *certiorari* to resolve this issue.

III. The Tenth Circuit's Decision That A State Can Constructively Waive Its Eleventh Amendment Immunity By Agreeing To Follow Federal Regulations Conflicts With Relevant Decisions Of This Court.

KSU has performed no affirmative act that has expressly waived its Eleventh Amendment immunity. The Tenth Circuit found waiver by examining the totality of the circumstances and piling inference upon inference. Quite simply, as explained in KSU's petition, the Tenth Circuit found an implied, constructive waiver, in direct contravention of this Court's recent decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999).

The only decision of this Court that ever found a constructive or implied waiver of Eleventh Amendment immunity was *Parden v. Terminal Ry. Co. of Ala. Docks Department*, 377 U.S. 184 (1964), which the Court expressly overruled in *College Savings Bank* last year. Although often asserted by parties suing a state, this Court never found constructive waiver of the Eleventh Amendment in another case. *See e.g. Employees of Dep't of Pub. Health and Welfare, Missouri v. Department of Pub. Health and Welfare,*

Missouri, 411 U.S. 279, 285 (1973) ("we cannot conclude that Congress conditioned the operation of [state institutions] on the forfeiture of immunity from suit in a federal forum" under the FLSA.); *Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974) (citation omitted) (the Court "will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'.... [a]nd while this Court has ... authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant."); *Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (agreement to recognize and obey all federal laws in exchange for federal funds insufficient to waive Eleventh Amendment); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245 (1985) (although "any recipient" of federal assistance under federal statute was required to be sued in federal court and states were known recipients, "given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.").

The conduct at issue here is the execution of an agreement between KSU and the USDOE, incorporating by reference federal agency regulations that do not themselves require the waiver of Eleventh Amendment immunity, expressly or otherwise.[2] *Cf. Kimel v. Florida Bd. of Regents*, 120 S. Ct.

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[2] The USDOE recently amended the regulations at issue to clarify their lack of effect on a State's assertion of its Eleventh Amendment immunity. In its official comment to the changes to Section 674.49, the USDOE stated that "[r]ecently, some State institutions have responded to undue hardship complaints by asserting that sovereign immunity barred relief on these claims in bankruptcy proceedings. We intend the proposed

631, 654 (2000) (Thomas, J., concurring) (emphasizing the *Atascadero* clear statement requirement and questioning whether even *statutes* incorporating abrogation provisions of other *statutes* by reference can satisfy that requirement, let alone separate documents promulgated by federal agencies). This is not a case where KSU voluntarily invoked the jurisdiction of the bankruptcy court, nor has KSU expressly waived its Eleventh Amendment immunity. Indeed, as respondents acknowledge, it is a case where the Tenth Circuit *implied* a waiver based on its analysis of all of the facts and circumstances.

KSU respectfully requests that this Court summarily reverse the Tenth Circuit's erroneous decision or, in the alternative, grant *certiorari* to resolve this issue.

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amendment to *make clear* that every institution must use due diligence to oppose discharge, but that State institutions may do so—if they wish—by asserting sovereign immunity as a defense to an undue hardship complaint. Unfortunately, some courts misconstrue Department regulations to bar State institutions from asserting sovereign immunity in these circumstances. We intend this amendment as an *authoritative explanation* of the meaning of the Federal Perkins Loan regulations and Program Participation Agreement on this due diligence obligation." *See* Discussion, Federal Perkins Loan Program, 64 Fed. Reg. 58,297, 58,307 (1999) (emphases added); *see also,* Christopher Johnsen & James C. Todd, *Federal Immunity Law in Higher Education*, 26 J.C. & U.L. 221, 229-30 (1999) (questioning holding of *Innes* because of lack of unequivocal statutory expression of waiver).

CONCLUSION

For the foregoing reasons, Kansas State University respectfully requests that this Court summarily reverse the decision of the Tenth Circuit or, in the alternative, grant *certiorari* to resolve the Circuit conflict and conclusively establish the criteria necessary for a state to waive its Eleventh Amendment immunity.

Respectfully submitted,

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